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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, JR., et al.,

Defendants.

CASE NO. 5:20-cv-05799-LHK

**JOINT STATUS REPORT ON  
DEFENDANTS' MOTION FOR  
PARTIAL RELIEF FROM NON-  
DISPOSITIVE PRETRIAL ORDER OF  
MAGISTRATE JUDGES**

Re: Dkt. Nos. 408, 409, 411

Date: TBD

Time: TBD

Place: Courtroom 8

Judge: Hon. Lucy H. Koh

On December 26, 2020, Defendants filed a Motion for Relief from Nondispositive Pretrial Order of Magistrate Judges (“Motion for Partial Relief”) (Dkt. 408). Pursuant to the Court’s subsequent Order Re: Response to Defendants’ Motion for Partial Relief from Non-Dispositive Pretrial Order of Magistrate Judges (“December 26 Order”) (Dkt. 409), and Order Continuing Case Management conference (Dkt. 411), the parties present the following Joint States Report.

## **I. PLAINTIFFS’ POSITION**

### **A. BACKGROUND**

On December 23, 2020, in accordance with the Magistrate Judge Panel’s December 15, 2020 Order on Further Procedures For *In Camera* Review of Documents on Privilege Logs (“Order on Privilege Procedures”) (Dkt. 383), Plaintiffs and Defendants submitted simultaneous briefing regarding Plaintiffs’ objections to Defendants’ assertions of privilege in their December 21 log. *See* Dkt. 403, 404. Plaintiffs’ objections highlighted the fact that Defendants’ December 21 privilege log contained a mere 135 documents (*see* Dkt. 404-1 (Ex. A)), notwithstanding Defendants’ December 12, 2020 representation to the Court that “a significant number of documents—as many as 2,944—are likely subject to Executive privilege,” as they “include communications between federal agency personnel and presidential advisers or members of their staff in the Office of the President.” December 12, 2020 Decl. of Brian DiGiacomo (“December 12 DiGiacomo Declaration”) (Dkt. 376-2) at ¶ 12 (emphasis added). Contrary to this prior representation, Defendants’ small December 21 privilege log did not include a single assertion of Executive privilege. *See* Dkt. 404 at 2-3. Plaintiffs asked the Court to order Defendants to immediately produce the 2,944 documents described in paragraph 12 of Mr. DiGiacomo’s declaration as being reviewed for White House privilege, except for any subset of documents for which privilege was being claimed on Defendants’ December 21 privilege log and which were not challenged by Plaintiffs and resolved by the Court’s Order. *Id.*

On December 24, 2020, the Magistrate Judge Panel agreed and ordered Defendants to “produce all of the 2,944 documents that declarant Brian DiGiacomo identified on December 12 as ‘likely subject to Executive privilege’ in ECF 376-2 ¶ 12, unless they were identified in the

December 21 log and the privilege was not overruled in this order.” Order After *In Camera* Review of Disputed Documents Identified in Government’s December 21 Privilege Log (“Order on Defendants’ December 21 Privilege Log”) (Dkt. 407) (noting also that Plaintiffs have raised “many concerning issues” regarding Defendants’ discovery conduct).

On December 26, 2020, Defendants filed a Motion for Partial Relief, asking the Court to reverse the Magistrate Judge Panel’s order to produce these documents because these documents are ostensibly not relevant. Dkt. 408. Defendants claimed that, of the 2,944 documents at issue, approximately 400 documents were deemed responsive and were produced; approximately 60 documents were deemed privileged; and the remaining more than 2,000 documents were deemed unresponsive, and were not produced or logged. Declaration of Brian DiGiacomo (Dkt. 408-1) (“December 26 DiGiacomo Declaration”) at 4. Defendants acknowledged that none of the documents withheld as privileged were withheld under the Presidential Communication or other Executive privileges. *Id.*

In accordance with the Court’s December 26 Order, the parties met and conferred for approximately two hours on December 28, 2020, discussing these documents and other discovery-related issues. During that meet and confer, Plaintiffs requested that Defendants (1) either produce the approximately 400 documents deemed responsive and not privileged, or provide their Bates numbers if they had already been produced; (2) confirm whether Defendants had logged the 63 documents that were withheld as privileged by providing their corresponding privilege log entry numbers; and (3) agree to a compromise solution regarding the 2,447 documents claimed to be non-responsive, in which Plaintiffs would conduct a limited, attorneys’-eyes-only review of those documents and meet and confer with Defendants on next steps involving judicial review, as necessary, to the extent any of the documents appeared responsive to Plaintiffs’ document requests; confidentiality would have been maintained throughout.

Defendants agreed to provide the requested information promptly regarding the 400 documents that should have been produced and the 63 documents that should have been logged as privileged. Defendants additionally agreed to consider the attorneys’-eyes-only review proposal. In a showing of good faith based on Defendants’ representations, on December 28,

2020 Plaintiffs requested that the Court temporarily hold in abeyance the Magistrate Judge Panel’s Order on Defendants’ December 21 Privilege Log, to the extent it required Defendants’ to produce the 2,944 documents in issue. Dkt. 410. Based on Defendants’ representations that the requested information would be promptly provided, Plaintiffs stated that they “hope to be able to provide the Court a further update at or before the case management conference scheduled for tomorrow, December 29, 2020.” *Id.*

The Court ordered the parties to file a joint status report on Defendants’ Motion for Partial Relief by December 29, 2020 at 2:00 p.m. PT. Order Continuing Case Management Conference (Dkt. 411). Despite Defendants’ representations to Plaintiffs, as of 20 minutes before this filing was due, Defendants have not provided Plaintiffs with any of the requested information. The Magistrate Judge Panel ruled on these documents nearly a week ago, and Defendants should have at the ready the basic information requested yesterday by Plaintiffs regarding production and logging. Yet Defendants have continued what can only be described, at this point, as a pattern of delay and obfuscation—despite Plaintiffs working stridently to reach good faith resolution of issued without requiring Court involvement.

### **B. Requested Relief**

This Court has broad discretion in how best to shape discovery and, when appropriate, to issue sanctions. *See* 1 Sanc. Fed. Law of Lit. Abuse § 28 (2019) (“The court is vested with broad discretion to fashion an appropriate inherent power sanction to redress abusive litigation practices.”); *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995) (“[I]nherent power sanctions available to courts include fines, awards of attorneys’ fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence.”).

As outlined below, Plaintiffs request that (1) Defendants should immediately produce or identify by Bates number the approximately 400 documents Defendants have deemed responsive and not privileged; (2) Defendants should immediately identify the privilege log entries corresponding to the 63 documents claimed as privilege, and be deemed to have waived any privilege if unable to do so; and (3) because Defendants have not provided any assurances

1 regarding the 2,447 documents they have concluded are not responsive, they should immediately  
 2 produce those to Plaintiffs for an initial attorneys'-eyes-only review, after which the parties can  
 3 meet and confer and, if necessary, raise with the Magistrate Judge Panel any disputes regarding  
 4 responsiveness.

5 **1. Defendants Should Immediately Produce or Identify the Bates**  
 6 **Numbers of the Approximately 400 Documents That Were Deemed**  
 7 **Responsive and Have Not Been Logged As Privileged**

8 The December 26 DiGiacomo Declaration states that over 400 of the 2,944 documents  
 9 “likely subject to Executive privilege” were deemed responsive and not privileged. December  
 10 26 DiGiacomo Decl. at ¶ 10. During the parties’ December 28 meet and confer, Defendants  
 11 represented that these documents had been produced, and that they would provide the Bates  
 12 numbers associated with them. To permit Plaintiffs to ascertain Defendants’ compliance with  
 13 the Court’s ordered discovery schedule, Defendants agreed to provide Plaintiffs with the Bates  
 14 numbers of all documents in the group of 2,944 documents in issue that were deemed responsive  
 15 and not privileged. However, as of this filing, Defendants have failed to provide Plaintiffs with  
 16 the Bates numbers for *any* of these responsive documents that were allegedly produced. There is  
 17 no excuse for this. Accordingly, Plaintiffs ask the Court to order Defendants, by December 30 at  
 18 5 p.m. PT, to produce the documents or to provide the Bates numbers corresponding to the  
 19 documents if they have been produced.

20 **2. Defendants Should Identify the Privilege Log Entries that Correspond**  
 21 **to Each of the 63 Allegedly Privileged Documents, or Should be**  
 22 **Found to Have Waived All Privileges As To These Documents**

23 The December 26 DiGiacomo Declaration states that, of the 2,944 documents originally  
 24 deemed “likely subject to Executive privilege,” a mere 63 documents involving the White House  
 25 were deemed responsive and “still claimed as privileged.” December 26 DiGiacomo Decl. at  
 26 ¶ 10. Defendants agreed to confirm that those documents have been logged and to provide the  
 27 corresponding log entries. However, they have not done so. Plaintiffs ask the Court to order that  
 28 by December 30 at 5 p.m. PT, Defendants provide a list of the privilege log entries that  
 correspond to each of the 63 allegedly privileged documents in issue. If Defendants have not in

fact logged these documents, Plaintiffs respectfully request that the Court find that Defendants have waived privilege as to this subset of documents and order their immediate production.<sup>1</sup>

**3. Defendants Should Produce the Remaining Documents to Plaintiffs for an Initial Attorneys'-Eyes-Only-Review, After Which the Parties Can Meet and Confer Regarding any Responsiveness Disagreements**

In their Motion for Partial Relief, Defendants assert for the first time that the Department of Commerce determined that “a large number of” the 2,944 documents earlier deemed “likely subject to Executive privilege” were actually not responsive to Plaintiffs’ Requests for Production. Dkt. 408 at 1. Defendants’ Motion provides details as to their search methodology, but notably provides no explanation as to why **83 percent** of the documents Defendants previously believed to be responsive were determined not responsive when reviewed. Without any such explanation, Plaintiffs and the Court are left without adequate assurances that Defendants have correctly determined the responsiveness of these documents. Any and all documents related to the census, apportionment, or the Presidential Memorandum are responsive to Plaintiffs’ Request for Production and should be produced; without any information from Defendants, Plaintiffs are unable to determine whether potentially key documents are being withheld as “not responsive” by Defendants.

Plaintiffs seek an efficient resolution of production with respect to the more than 2,000 documents at issue. Plaintiffs request that the Court order Defendants to produce these documents to Plaintiffs for a limited, attorney’s-eyes-only-review of these documents by outside litigation counsel. *See, e.g., Nachurs Alpine Sols., Corp. v. Banks*, No. 15-CV-4015-LTS, 2017 WL 2918979, at \*3-5 (N.D. Iowa July 7, 2017) (ordering defendants to produce documents deemed nonresponsive for plaintiff’s attorney’s eyes only responsiveness review, and emphasizing that the court’s confidence in defendants’ responsiveness designations was “colored” by the “conclusion that defendants ha[d] previously not complied with discovery obligations”). During this initial review, only outside litigation counsel would have access to the

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<sup>1</sup> Plaintiffs’ December 18, 2020 Response to Court’s Ruling Ordering Defendants to Show Cause (Dkt. 400) is incorporated herein by reference.

documents in question, and they would not be reviewed by any named Plaintiffs or other counsel.

Following an attorney's-eyes-only review, Plaintiffs will raise with Defendants any documents which Plaintiffs view as responsive. The parties can then ask the Magistrate Judge Panel to rule on any responsiveness disputes the parties are not able to resolve.

Plaintiffs' request is informed by Defendants' past defiance of the Court's discovery orders, and their prior productions, which have included large volumes of non-responsive documents. Defendants cannot now, with any credibility, point to the risk of producing a non-responsive document to Plaintiffs to attempt to avoid producing these potentially key documents. An attorney's eyes only responsiveness review is both appropriate and necessary, and is more efficient than asking the Magistrate Judge Panel to themselves review 2,447 documents.

Plaintiffs respectfully request that the Court order Defendants to produce all 2,447 documents deemed non-responsive to Plaintiffs' litigation counsel at Latham & Watkins by December 30, 2020 at 5 p.m. PT.

### **C. Conclusion**

Plaintiffs respectfully request that the Court order that Defendants: (1) provide Bates numbers for the over 400 of 2,944 documents now deemed responsive and not privileged and/or produce all of these documents that have not yet been produced; (2) provide the privilege log entry numbers for the 63 of 2,944 documents "still claimed as privileged" that involve the White House, or produce any documents that have not been logged because the privilege has now been waived; and (iii) produce to litigation counsel at Latham & Watkins all 2,447 of 2,944 documents now deemed non-responsive to Plaintiffs' Requests for Production, to allow for an attorney's-eyes-only responsiveness review. Plaintiffs ask the Court to order Defendants' compliance with these items by December 30, 2020 at 5 p.m. PT.

## **II. DEFENDANTS' POSITION**

Defendants filed an objection with the Court (ECF 408) related to a subset of material implicated by one aspect of the December 24, 2020 Order by the Magistrate Judges to the extent the Order requires production of documents the Department of Commerce has concluded are not



responsive to Plaintiffs’ document requests. See ECF 407 Order After In Camera Review of Disputed Documents Identified in Government’s December 21 Privilege Log (herein after “MJ Privilege Order”). Specifically, a portion of the MJ Privilege Order requires Defendants to “produce the 2,944 documents that declarant Brian DiGiacomo identified on December 12 as ‘likely subject to Executive privilege’ ECF 376-2 ¶ 12, unless they were identified on the December 21 log and the privilege was not overruled in this order.” ECF 407 at 7. With their objection, Defendants submitted an additional declaration of Mr. DiGiacomo, which described the nature of the Department of Commerce’s review of the 2,944 documents and the manner by which the Department of Commerce made its responsiveness determinations. ECF 408-1 at ¶¶ 2-12.

In accordance with this Court’s Order of December 26, 2020, the parties met and conferred about these documents on Monday, December 27, 2020 by phone. Plaintiffs asked for additional information about the documents, in particular, Bates Ranges for any documents produced out of the 2944 set, as well as Privilege Log entry information for documents deemed responsive but privileged from this same 2944 set. Defendants provided information they were able to gather on December 29, 2020, and will provide Plaintiffs further information if necessary. Defendants regret that they were not able to provide the information to Plaintiffs sooner.

During the meet and confer, Plaintiffs also suggested that all non-responsive items from the 2944 set be provided to them under an attorneys-eyes arrangement. Defendants do not believe this suggestion is appropriate. First, there is no basis to think that Defendants have made an effort to minimize the production of responsive information from the 2944 set; Mr. DiGiacomo’s additional declaration indicates that reviewers were told to conclude documents were responsive if they related to the “decennial census.” ECF 408-1 at ¶¶ 8-11. Defendants submit that this showing should address any concern about skewed responsiveness determinations. In addition, providing materials to Plaintiffs’ counsel under an attorney’s-eyes only protective order, when such materials are non-responsive and potentially privileged would undermine the adversarial nature of this case. It is not appropriate to allow such access by an opposing party. Defendants believe their objection to be well-supported and ask the Court to set aside this portion of the MJ Privilege Order.



1  
2 Dated: December 29, 2020

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25 **ATTESTATION**

26 I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this  
27 document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred  
28 in this filing.

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